

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In The Matter of

**Notice of Inquiry Concerning a Review of the
Equal Access and Nondiscrimination Obligations
Applicable to Local Exchange Carriers**

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) **CC Docket No. 02-39**
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**COMMENTS OF
THE ASSOCIATION OF COMMUNICATIONS ENTERPRISES**

The Association of Communications Enterprises (“ASCENT”),¹ through undersigned counsel and pursuant to Section 1.430 of the Commission’s Rules, 47 C.F.R. § 1.430, hereby submits its comments in response to the *Notice of Inquiry*, FCC 02-57, released February 28, 2002, in the captioned proceeding (“*NOI*”). In the *NOI*, the Commission seeks comment on “the existing equal access and nondiscrimination obligations of Bell Operating Companies (BOCs), both with and without section 271 authority,” as well as “the existing equal access and nondiscrimination obligations of incumbent independent local exchange carriers (LECs) and competitive LECs.”² The *NOI* further asks commenters to discuss “what the equal access and nondiscrimination obligations of all these carriers should be, considering the many legal and marketplace changes that have

¹ ASCENT is a national trade association representing smaller providers of competitive telecommunications and information services. The largest association of competitive carriers in the United States, ASCENT was created, and carries a continuing mandate, to foster and promote the competitive provision of telecommunications and information services, to support the competitive communications industry, and to protect and further the interests of entities engaged in the competitive provision of telecommunications and information services.

² NOI, FCC 02-57 at ¶ 1.

transpired since the earlier requirements were adopted.”³ ASCENT submits the following comments in response to these inquiries.

Initially, ASCENT is concerned that the goals by which the Commission suggests this inquiry will be guided, while laudable ends, may produce anticompetitive results if not applied with care. Certainly, efforts should be made to “facilitate an environment that will be conducive to competition, deregulation and innovation,” because “carriers freed from *unnecessary* regulation . . . [will be] more likely to compete and innovate more aggressively.”⁴ However, prematurely freeing carriers that retain market power from regulatory constraints which limit abuse of that power will produce the exact opposite result. Likewise, “harmoniz[ing] the requirements of *similarly-situated* carriers” makes eminent sense, but applying to carriers possessed of market power requirements which are adequate only to ensure pro-competitive behavior by carriers lacking such power will not further the Commission’s articulated goal of “benefit[ing] consumers.”⁵

³ Id.

⁴ Id. at ¶ 2 (*emphasis added*).

⁵ Id. (*emphasis added*).

As the *NOI* notes, Congress, through the vehicle of Section 251(g) of the Communications Act of 1934 (“Communications Act”), as amended by the Telecommunications Act of 1996 (“Telecommunications Act”), 47 U.S.C. § 251(g), left in place “the equal access and nondiscrimination requirements that were established for LECs ‘under any court order, consent decree, or regulation, order, or policy of the Commission’ prior to the passage of the 1996 Act” to safeguard against abuse by incumbent LECs of residual market power.⁶ That incumbent LECs continue to possess market power in the local exchange/exchange access market is indisputable. As the Commission has recently determined, six years following the enactment of the Telecommunications Act, incumbent LECs retain a market share in excess of ninety percent.⁷ And as the Commission has previously recognized, carriers which “possess control of bottleneck facilities,” as well as carriers that possess “an overwhelming share” of a market,” “must be treated as dominant.”⁸ Nor does grant of Section 271 authority in a given state require a contrary conclusion. Simply because a market has been opened to competitive entry does not mean that the prior monopoly provider has been stripped of market power, particularly when the prior monopoly

⁶ Id. at ¶ 3.

⁷ Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001, p. 1, Table 1 (February 2002).

⁸ Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor (First Report and Order), 85 F.C.C.2d 1, ¶¶ 62 - 63 (1980) (*subsequent history omitted*). Indeed, the Commission noted in recategorizing AT&T’s domestic interexchange operations as non-dominant that “[at] the time of the Competitive Carrier First Report and Order, AT&T had approximately 90 percent of the overall long distance market,” but that “AT&T’s market share . . . [had fallen] from approximately 90 percent to 55.2 and 58.6 percent in terms of revenues and minutes, respectively.” Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier (Order), 11 FCC Rcd. 3231, ¶ 67 (1995) (*subsequent history omitted*).

provider continues to control virtually all connectivity to the entire universe of customers.⁹

⁹ Even in the State of New York, which the NOI cites as evidencing the greatest competitive market penetration -- *i.e.*, "23 percent of all end-user lines" -- the large majority of customers served by competitors are served, either entirely (*i.e.*, through the UNE-Platform or resale) or in part (*i.e.*, through self-provisioned switching in conjunction with UNE loops) over Verizon facilities, which means that Verizon generally retains ultimate control of the necessary customer connectivity even when service is provided by a competitive LEC. Of course, Section 271 authority has been granted in other states which evidence but a fraction of the New York competitive market penetration -- *e.g.*, Arkansas, Missouri, Oklahoma, and Vermont. Industry Analysis and Technology Division, Wireline Competition Bureau, Local Telephone Competition: Status as of June 30, 2001, at Table 6.

While, as the *NOI* declares, Section 251(g) “grants the Commission authority to prescribe regulations superseding pre-existing equal access and nondiscrimination obligations,”¹⁰ exercise by the Commission of such authority must not undermine, and, indeed, should further, Congressional objectives set forth in Sections 251 and 271 of the Communications Act, 47 U.S.C. §§ 251, 271. The principal goal Congress sought to achieve in enacting Sections 251 and 271 was the “fostering [of] competition in both the interexchange and local exchange markets.”¹¹ Hence any actions taken by the Commission under the rubric of Section 251(g) may not be driven by a myopic desire to relieve incumbent LECs of regulatory oversight. Deregulation can only be effected under Section 251(g), or any other provision of the Communications Act which impacts upon the competitive texture of the interexchange and local exchange markets, once the pro-competitive ends Congress sought to achieve have been realized. If the de-regulatory ends that Congress sought to achieve by fostering the competition that would render some or all regulation unnecessary are

¹⁰ NOI, FCC 02-57 at ¶ 4.

¹¹ Southwestern Bell Telephone Company v. Federal Communications Commission, 153 F.3d 597, 600 (8th Cir. 1998) (*subsequent history omitted*).

implemented by regulatory fiat instead, the Congressional goal of “fostering competition in both the interexchange and local exchange markets” will be lost.¹²

As the Commission has recognized, Section 251(g) performs a dual function. It “preserves the right of interexchange carriers to order and receive exchange access services if such carriers elect not to obtain exchange access through their own facilities or by means of unbundled

¹² It is undeniable that in enacting the Telecommunications Act, Congress adopted an intensely regulatory policy framework which imposed unprecedented obligations and safeguards on incumbent LECs. Not only did Congress require incumbent LECs “to open their networks to competition,” but it mandated the removal of all “significant economic impediments” and “existing operational barriers” to market entry, by, among other things, requiring incumbent LECs for the first time to facilitate physical network interconnection, allow collocation in central offices and elsewhere, and permit unbundled access to elements of their network, all at statutorily prescribed rates and charges, as well as directing incumbent LECs to make their services available for resale at statutorily prescribed discounts. Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, ¶¶ 1 - 20 (1996) (*subsequent history omitted*). It is difficult to characterize such actions as a mandate for deregulation.

network elements purchased from an incumbent,”¹³ and it safeguards against discrimination by the former BOCs in favor of their retail interexchange operations,¹⁴ or, for that matter, any affiliated or unaffiliated interexchange carriers.¹⁵ ASCENT recommends that these functions be preserved, and

¹³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at ¶ 362.

¹⁴ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, ¶ 290 (1996) (*subsequent history omitted*).

¹⁵ AT&T Corporation, et al. V. Ameritech Corporation and Qwest Communications Corporation (Memorandum Opinion and Order), 13 FCC Rcd. 21438, ¶¶ 53 - 63 (1998) (*subsequent history omitted*).

expanded, in “regulations prescribed by the Commission” pursuant to the mandate of Section 251(g).¹⁶

¹⁶ The NOI asks whether the Commission must “adopt new rules to replace the existing section 251(g) requirements or [whether it is] . . . enough for the Commission to state in an order that such requirements are no longer necessary in the wake of the 1996 Act . . . [or whether it] should . . . forbear from such requirements to the extent they meet the standards of section 10?” NOI, FCC 02-57 at ¶ 10. ASCENT submits that Section 251(g) provides the Commission with little flexibility in this regard. In Section 251(g), Congress directed the Commission to “prescribe regulations” which would “explicitly supercede[]” existing “equal access and nondiscriminatory interconnection restrictions and obligations.” Moreover, in enacting Section 251(g), Congress expressed its expectation that “[w]hen the Commission promulgates . . . [such] new regulations” it would “explicitly identify those parts of the interim restrictions and obligations that it . . . [was] superceding.” S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 123 (1996). Given that the Commission may not ignore an express statutory mandate, it must adopt new rules, identifying in so doing the requirements that such rules are superceding. General discussion of the Telecommunications Act will not suffice, and forbearance is not an option. When Congress directs the Commission to take an action, the Commission may not decline to do so in reliance upon Section 10, 47 U.S.C. § 160. Section 10 authorizes the Commission to “forbear from applying any regulation or any provision of . . . [the Communications] Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services.” 47 U.S.C. § 160. It does not authorize the Commission to ignore a Congressional directive.

The legislative history of the Telecommunications Act makes clear that Congress enacted Section 251(g) to constrain at least the conduct of the former BOCs and the “GTE Operating Companies” (“GTE”).¹⁷ Congress felt it necessary to ensure that these entities would “continue to provide equal access and nondiscrimination to interexchange carriers and information service providers.”¹⁸ ASCENT submits that at least BellSouth Corporation (“BellSouth”), Qwest Communications International, Inc. (“Qwest”), SBC Communications Inc. (“SBC”), and Verizon should continue to be held to the equal access and nondiscrimination requirements that they have been operating under during the six years following enactment of the Telecommunications Act, and that other incumbent LECs should not be freed from the equal access and nondiscrimination requirements under which they have been operating until such time as they have been declared non-dominant in the local exchange markets they serve as incumbents.¹⁹

As the *NOI* recognizes, “equal access and nondiscrimination requirements were originally imposed to respond to the concern that the BOCs would provide inferior interconnection to AT&T’s competitors than to AT&T.”²⁰ Put differently, these requirements reflected a concern that entities that controlled “bottleneck” facilities would utilize that control to favor one carrier to the detriment of competitive providers. “[U]nderlying the BOCs’ equal access and

¹⁷ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. at 122 - 23.

¹⁸ Id. at 122.

¹⁹ Because competitive LECs do not control “bottleneck” facilities and lack both cognizable market share and certainly market power, there is no need to extend equal access and nondiscrimination requirements to them.

²⁰ NOI, FCC 02-57 at ¶ 11.

nondiscrimination obligations” is “a principle of non-favoritism.”²¹ The concern that incumbent LECs will favor their own retail interexchange operations or interexchange affiliates is even more solidly based than the concern that the newly-divested BOCs would favor AT&T.²² The former after all is revenue driven, while the latter implicates non-monetary incentives.

Favoring one’s own retail interexchange operations or affiliates is not necessarily detrimental to competition. It becomes so, however, when the entity engaging in such favoritism retains control of the facilities necessary for connectivity with the preponderance of the customer universe. In such a circumstance, favoritism becomes anti-competitive, serving as a means of leveraging market power in the local exchange market into the interexchange market. And as noted above, incumbent LECs continue to dominate the local exchange/exchange access market and retain control of “bottleneck” facilities. Incumbent LECs which provide, or which will be providing, in-region, interLATA service are in a position to exploit their market power in the local exchange market to gain an unfair competitive advantage in the interexchange market.

²¹ AT&T Corporation, et al. V. Ameritech Corporation and Qwest Communications Corporation (Memorandum Opinion and Order), 13 FCC Rcd. 21438 at ¶ 55.

²² The NOI queries whether equal access and nondiscrimination obligations should be imposed on incumbent LECs “[i]n an era when there are no longer any dominant interexchange providers.” NOI, FCC 02-57 at ¶ 11. ASCENT submits that the pertinent consideration is not the presence or absence of a dominant interexchange carrier, but the continued dominance of incumbent LECs in the local exchange market, with the ability attendant thereto for the incumbent LECs to prefer their own retail interexchange operations or interexchange affiliates.

Given that the equal access and nondiscrimination requirements at issue here had their genesis in the Modification of Final Judgment (“MFJ”), and the accompanying Consent Decree, ASCENT recommends that the Commission, in determining when incumbent LECs should be freed from these obligations, apply the standard long-ago articulated by Judge Harold H. Greene for lifting a line-of-business restriction embodied in the MFJ. Judge Greene applied a two-part analysis. First, he determined whether a BOC retained control of the network facilities necessary for competitors to reach customers. If it did, then he explored whether the BOC possessed the incentive and the ability to use such “bottleneck” control to impede competition.²³ In 2002, incumbent LECs retain control of the same “local switches and circuits . . . that gave the Bell System its power over the competition” post divestiture.²⁴ That control translates into the ability to disadvantage current or potential interexchange carrier competitors. And the grant of Section 271 authority, or the potential for such

²³ See, e.g., United States v. Western Electric Co., 673 F.Supp. 525, 536 (D.D.C. 1987) (*subsequent history omitted*).

²⁴ Id.

grant, certainly provides ample incentives to act anticompetitively. That ability and incentive will remain until such time as the control of “bottleneck” facilities from which it emanates is eliminated.²⁵

Applying this construct, ASCENT, in response to the various inquiries made regarding the regulations which should succeed existing equal access and nondiscrimination requirements, urges the Commission to require BOCs “to provide information regarding all available interexchange providers to customers seeking service, not just customers seeking ‘new service’.”

Given that the predicate for the provision of information “regarding all available interexchange providers” is the control by incumbent LECs of connectivity to the vast preponderance of customers, there is no basis for distinguishing between new and additional service. If the goal is to “make sure that customers make their long distance choices based solely on the merits of a long distance offering,” without undue influence being exerted by the incumbent LEC,²⁶ informational requirements should be extended to all service requests.

²⁵ The suggestion by the NOI that Section 251, or for that matter 201 or 202 of the Communications Act, 47 U.S.C. §§ 201, 202, negate “the need for separate equal access and nondiscrimination requirements” is untenable. Congress would not have incorporated Section 251(g) into the Communications Act if it believed that Section 251, 201 and/or 202 fully addressed the concerns which prompted the imposition of equal access and nondiscrimination requirements.

²⁶ AT&T Corporation, et al. V. Ameritech Corporation and Qwest Communications Corporation (Memorandum Opinion and Order), 13 FCC Rcd. 21438 at ¶ 57.

As to “the relationship between sections 272 and 251(g) and the sphere of marketing activities that BOCs with section 271 authority may pursue,”²⁷ ASCENT submits that the Commission should be guided in promulgating new equal access and nondiscrimination rules by the same construct as set forth above. So long as incumbent LECs continue to dominate the local exchange market, serving the vast preponderance of customers and providing connectivity to an even higher percentage, incumbent LECs should not be permitted to exploit their dominant position to secure unfair competitive advantage. This means that incumbent LECs should not be able to conduct outbound marketing targeted at existing local customers on behalf of their retail interexchange operations or interexchange affiliates, nor should they be permitted to use local bills as a promotional vehicle for such retail operations or affiliates.²⁸ And incumbent LECs certainly should not be permitted to offer discounts on local service in return for signing up for interexchange service provided by the incumbent LEC or its interexchange affiliates. In each of these circumstances, the incumbent LEC would be leveraging market dominance in the local market derived from a prior monopoly franchise in order to gain an unfair advantage in the interexchange

²⁷ NOI, FCC 02-57 at ¶ 16.

²⁸ The NOI asks whether incumbent LEC equal access and nondiscrimination obligations should vary depending upon whether service is provided on an integrated basis or through an affiliate. ASCENT submits that they should not. Any difference recognized would elevate form over substance, because the anticompetitive impact would not only be the same in both instances, but it would derive from the same exploitation of market power. And the same holds true when assessing the obligations that should be imposed on various incumbent LEC affiliates, whether or not required by Section 272.

market.

While Section 272(g)(2) authorizes joint marketing by an incumbent LEC of interexchange services, such activity must be undertaken in a manner consistent with the incumbent LEC's equal access and nondiscrimination obligations under Section 251(g). Otherwise Section 251(g) would be rendered an effective nullity. And it is a basic tenet of statutory construction not

only that provision of a statute must be read to the greatest extent possible in harmony,²⁹ but that statutes should never be interpreted to render individual provisions without meaning.³⁰

Finally, with respect to the *NOI*'s questions regarding "the type of marketing agreements between BOCs and other carriers [that] are permissible under section 251(g),"³¹ ASCENT once again suggests that the Commission be guided by the construct detailed above. "Teaming arrangements" should be available on a nondiscriminatory basis. Use of market dominance to prefer an unaffiliated carrier over all others is no less competitively detrimental than preferences for an affiliate.

By reason of the foregoing, the Association of Communications Enterprises hereby urges the Commission, consistent with these comments, to restate and expand the existing equal

²⁹ James Madison Ltd. by Hecht v. Ludwig, 82 F.3d 1085, 1093 (D.C.Cir. 1996) (*subsequent history omitted*); American Tunaboat Association v. Brown, 67 F.3d 1404, 1408 (9th Cir. 1995) ("interpret language in one section of a statute consistently with language of other sections").

³⁰ Northwest Forest Resource Council v. Glickman, 82 F.3d 825, 833 - 34 (9th Cir. 1996) ("statute must be interpreted to give significance to all of its parts . . . statutes should not be construed to make surplusage of any provision"); Boise Cascade Corporation v. U.S. Environmental Protection Agency, 942 F.2d 1427, 1432 (9th Cir. 1991) ("[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous.").

³¹ NOI, FCC 02-57 at ¶ 15.

access and nondiscrimination obligations of the former Bell Operating Companies and other incumbent local exchange carriers.

Respectfully submitted,

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